1951

Benjamin B. Alward v. R. E. Green dba National School Assemblies : Brief of Respondent

Utah Supreme Court

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7649

In the Supreme Court
of the State of Utah

BENJAMIN F. ALWARD,
Plaintiff-Appellant,

vs.

R. E. GREEN, doing business as NATIONAL SCHOOL ASSEMBLIES,
Defendant-Respondent.

Case No. 7649

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent agrees with the statement of facts set forth in the appellant's brief, but desires to give in more detail the evidence relating to the purported agency of R. W. Dill, upon whom the attempted service of summons was made.

Dill was a resident of San Diego, California. On January 16, 1950, he and his brother were in Salt Lake City for the purpose of filling engagements booked for them by the defendant (R. 30). The defendant had acted

as their agent in securing said bookings. Dill was engaged in filling such bookings for a period of only five weeks. He had just commenced filling said engagements when the summons was served on the 16th day of January, 1950 and when the matter was heard on the 11th day of February, 1950, he had completed his engagements and was intending to return to San Diego. While in Salt Lake he and his brother had fulfilled three bookings made for them by Mr. Clarence Smith at Salt Lake Ctiy, who, like the defendant, was also a booking agent. These performances were given two at the Hotel Utah and one at the Newhouse Hotel. The defendant received nothing from those performances (R. 31). The defendant had no control over the operations of Dill other than seeing that the bookings made for Dill by the defendant were filled (R. 32). Dill retained the first $200.00 per week collected for performances given pursuant to bookings by the defendant and all over $200.00 per week collected by Dill was paid to the defendant for defendant's services (R. 32). With very few exceptions all checks were made directly to Dill from the schools where the performances were given. Occasionally a school would make a check payable to National School Assemblies (R. 33). Dill did not carry a power of attorney to cash any check made out to the National School Assemblies and would send any such check to the defendant as a credit on any balance over $200.00 collected for any week (R. 34). Collections were made by Dill for himself not for the defendant (R. 36). Before leaving California to fill engagements made for him by the defendant, Dill

received a mimeographed set of suggestions from the defendant. Dill received no directions from the defendant relative to the giving of a show other or different from those received from any other booking agent of the said Dill (R. 39). That the Defendant determined where Dill would perform and sent to Dill a schedule ahead of time. That Green had set a prearranged price for Dill's program and scheduled a number of programs to be given and suggested the length of time of the program (R. 40).

There is one other fact that the defendant desires to call attention to. As stated in the appellant's brief at page 7:

> "While in Salt Lake City the plaintiff corresponded with defendant. As a result of this correspondence and because of his not reaching South Dakota, the plaintiff received a letter from the defendant whereby the latter cancelled the remainder of the plaintiff's tour of the midwest for the year and terminated the plaintiff's contract (Exhibit A)."

Exhibit "A" was signed and mailed in Los Angeles, California, and was in answer to a letter of inquiry from the plaintiff concerning plaintiff's future activities. Exhibit "A" was received in Salt Lake City by the plaintiff.

STATEMENT OF POINTS RELIED UPON

1. The Court erred in finding that the defendant had an agent in Utah if by that the Court meant that R. W. Dill was an agent of the defendant upon whom service of summons could be made under the provisions of Rule 17 (e) and Rule 4 (e) (10), Utah Rules of Civil Procedure.

2. The Court did not err in holding that the defendant by and through R. W. Dill, the purported agent upon whom service of summons was made, was not doing business at the school where the attempted service of summons was made within the contemplation of Rules 17 (e) and 4 (e) (10) of the Rules of Civil Procedure.

3. The Court did not err in holding that the school at which the defendant's purported agent was served with summons was not a place of business of the defendant within the contemplation of Rules 17 (e) and 4 (e) (10).

4. The Court did not err in holding that the cause of action did not arise out of the conduct of business in the State of Utah within the contemplation of Rule 17 (e) and Rule 4 (e) (10).

ARGUMENT

POINT ONE

THE COURT ERRED IN FINDING THAT THE DEFENDANT HAD AN AGENT IN UTAH IF BY THAT THE COURT MEANT THAT R. W. DILL WAS AN AGENT OF THE DEFENDANT UPON WHOM SERVICE OF SUMMONS COULD BE MADE UNDER THE PROVISIONS OF RULE 17 (e) AND RULE 4 (e) (10), UTAH RULES OF CIVIL PROCEDURE.

Rule 17 (e) provides:

> "When a nonresident person is associated in and conducts business within the State of Utah in one or more places in his own name or a common trade name and said business is conducted under the *supervision of a manager, superintendent or agent,* said person may be sued in his own name in any action arising out of the conduct of said business."

Rule 4 (e) (10) provides:

> "Personal Service in this State. Personal service within the state shall be as follows:
>
> * * * (10) upon a natural person, nonresident of the State of Utah, doing business in this state at one or more *places of business* as set forth in Rule 17 (e) by delivering a copy thereof to the defendant personally, or to one of his managers, superintendents, or agents."

Any act providing for substituted service upon an individual in order to be constitutional must provide certain safeguards for the defendant. The following discussion from the case of *Davidson v. Doherty & Company,* 214 Iowa 739, 241 N.W. 700, 91 A.L.R. 1308, points out these requirements:

"It is frequently stated as a general proposition that the processes of a state court do not extend beyond its borders and that a state cannot in general obtain jurisdiction of a nonresident in an action in personam unless the defendant is served within the state or appears to the action. To this broad and general statement of the rule there are exceptions, as for example, where there is a waiver or a contract to the contrary * * *

"Another exception, or more properly speaking, a rule as to what constitutes due notice is illustrated by the cases upholding statutes where a nonresident of a state, by carrying on certain lines of business or doing certain acts, as dealing in securities or driving an automobile on the public highways, is required, or presumed, to designate an officer or agent in said state upon whom service of notice may be made in actions in said state growing out of the business or acts done * * *

"Similarly, there are statutes such as the one under consideration, where a nonresident voluntarily comes within the state and establishes an office or agency and transacts business, and the service of summons is made by substituted service upon the agent of the defndant, and the action is one growing out of that office or agency.

"Does such a statute meet the requirements of 'notice and opportunity to defend'? If notice on a public officer, such as a registrar or secretary of state is sufficient in an action in personam against a nonresident no good reason is apparent why a notice by like substituted service on a party's own agent in charge of his business in actions growing out of such business should not be equally valid."

The question then becomes one of whether or not substituted service is on a party's agent in charge of his business. If the one served is not an agent in charge of the defendant's business, the requirements of notice and opportunity to defend are not met.

The court said in *Davidson v. Doherty & Company,* supra:

> "As is said in Hess v. Pawloski, 274 U.S. 355, 47 S. Ct. 632-633, 71 L.ed. 1091: 'The mere transaction of business in a state by nonresident persons does not imply consent to be bound by the process of its courts.'
>
> "Moreover, the agency of one upon whom service is made must be such as to render it fairly reasonable and just to imply authority on the part of the agent to receive service * * *
>
> "The agent must be one who may fairly be presumed to have the duty of communicating to his principal the fact of service."

In the case of *Wein v. Crockett,* 195 Pac. (2d) 222 at page 228, Justice Latimer, speaking for the majority, stated:

> "The act requires service of process to be made on an agent of the nonresident and that the agent at the time of service must be conducting the business for and on behalf of the nonresident and the action must arise out of the business transacted in the state. If the agent has the capacity to perform as manager, superintendent or agent in supervising the affairs of a nonresident, we can infer he will have the capacity to understand the necessity of notifying the principal in time to permit proper protection of the principal's rights."

The appellant cites at length in his brief from the case of *Melvin Pine & Company v. McConnell,* 273 App. Div. 218, 76 NYS (2d) 279, 10 A.L.R. (2d) 194. In that case the Court said:

> "The statutory requirements for doing business in this state is not satisfied unless a substantial part of the business is conducted within the state and the person in charge thereof invested with general powers of judgment and discretion * * *
>
> "Nevertheless on the record in this case there would seem to be no gainsaying the fact that they (the parties served) were agents invested with general powers involving judgment and discretion in connection with the defendant's business and the advancement of defendant's interests."

Dill was not such an agent as the statute contemplates. He was an independent contractor. He was the principal and Green was his agent. Dill was under no duty to transact any business for the defendant and he was under no duty to communicate the fact of service to the defendant.

Rule 4 (e) (10) provides that service may be made in this state at one or more places of business. The statute contemplates a permanent office or place of business at which an agent or superintendent shall be in charge whose duty it is to transact the business of the nonresident defendant, invested with general powers of judgment and discretion in directing the affairs of the nonresident defendant. A performer who is fulfilling an itinerary or schedule previously booked

by the defendant and who had no duty to perform other than fulfilling those bookings and paying any surplus that he received over $200.00 a week, was not such a manager, superintendent or agent within the contemplation of the statute and the school building was not a place of business within the contemplation of the statute.

The defendant calls the attention of the Court to the fact that the evidence as to the authority of Alward, the plaintiff, as set forth at pages 24 to 28 of the plaintiff's brief, does not apply to Dill. Dill definitely stated that he did not have a power of attorney to cash or endorse any checks such as Alward had. Nor is there any evidence that the other matters therein set forth had any application to the relationship existing between Dill and the defendant. Alward intended to act as a performer for a year or more. Green made bookings for Dill for a period of five weeks only.

There are two methods of serving nonresident defendants. One is that set forth in the second paragraph of the first quotation from *Davidson v. Doherty,* supra. Such is where a nonresident is carrying on a certain line of business such as selling securities or driving an automobile in the state and the statute requires service upon an officer in the state such as the Secretary of State for the nonresident. These cases all provide that a copy of the complaint and summons must be immediately sent, registered mail, with receipt requested, to the defendant. In that class of cases is

the case of *International Shoe Company v. Washington,* discussed in the plaintiff's brief at pages 32 and 33. The other method of serving nonresident defendants is that set forth in the third paragraph of the citation from *Davidson v. Doherty,* where a nonresident voluntarily comes into the state and establishes an office or agency and the service of summons is made by substituted service upon a manager, superintendent or agent of the defendant, and the action is one growing out of that office or agency. In this class of cases there is no requirement that a copy of the complaint and summons be mailed to the defendant, therefore it is necessary that the one served be an agent, superintendent or manager, whose duty it is to transmit the summons when served upon him, and as said in the case of *Melvin Pine & Company v. McConnell,* supra, the agent must be one vested with general powers involving judgment and discretion in connection with the defendant's business.

POINT TWO

THE COURT DID NOT ERR IN HOLDING THAT THE DEFENDANT BY AND THROUGH R. W. DILL, THE PURPORTED AGENT UPON WHOM SERVICE OF SUMMONS WAS MADE, WAS NOT DOING BUSINESS AT THE SCHOOL WHERE THE ATTEMPTED SERVICE OF SUMMONS WAS MADE WITHIN THE CONTEMPLATION OF RULES 17 (e) and 4 (e) (10) OF THE RULES OF CIVIL PROCEDURE.

The cases cited above and the cases cited under Point Four cover this point.

POINT THREE

THE COURT DID NOT ERR IN HOLDING THAT THE SCHOOL AT WHICH THE DEFENDANT'S PURPORTED AGENT WAS SERVED WITH SUMMONS WAS NOT A PLACE OF BUSINESS OF THE DEFENDANT WITHIN THE CONTEMPLATION OF RULE 17 (e) and 4 (e) (10).

The cases cited above and the cases cited under Point Four cover this point.

POINT FOUR

THE COURT DID NOT ERR IN HOLDING THAT THE CAUSE OF ACTION DID NOT ARISE OUT OF THE CONDUCT OF BUSINESS IN THE STATE OF UTAH WITHIN THE CONTEMPLATION OF RULE 17 (e) AND RULE 4 (e) (10).

Counsel for the plaintiff argues at length that Rule 17 (e) refers only to "action" and not "cause of action" and that under the statute a cause of action need not arise in Utah so long as the action is filed in Utah. At page 24 of plaintiff's brief, he states:

> "In those places where Justice Latimer indicated that the situs of the cause of action had anything to do with the case, his statements were pure dicta and not significant since there was no reason in the Wein case for making such a distinction betwen the terms."

The law is clear that nonresidents cannot be sued in this state except upon a cause of action which arises in this state. Justice Latimer's many statements in the Wein case concerning "cause of action" arising in this state were not dicta. They were merely a correct statement of the law. Without the limitations restricting the statute to causes of action arising in this state the act would be unconstitutional.

The plaintiff in his brief states that the Trial Court labored under the impression that the cause of action must arise in Utah and that in that the Court was in error. The defendant submits that the Court was not in error on that point.

After reviewing the authorities, Justice Latimer in the case of *Wein v. Crockett,* supra, stated the law to be as follows:

> "Having roughly traced the trend of authorities away from the strict and narrow holdings of the early cases to more liberal principles of permitting a nonresident to be sued in a jurisdiction where he has performed certain acts or transacted certain business, providing, the cause of action arose out of the acts or the business transacted, we pass to consider whether or not our act meets the test of constitutionality as set forth by the later holdings of the Supreme Court. * * *
>
> "The act requires a service of process to be made on an agent of the nonresident and that the agent at the time of the service must be conducting the business for and on behalf of the nonresident and the action must arise out of the business transacted in the state. * * *
>
> "We can see no real objections to a statute which only forbids a nonresident from doing business in this state until such time as they have consented to the jurisdiction of our Courts to rule on causes of action springing into existence within this state and arising out of the business carried on in this state. We are not convinced that such an act, does, in fact, deny a nonresident equal protection of the law or deprive them of property without due process

of law. If the cause of action arises in this state, out of business being transacted in this state, the possibilities are that the witnesses will be readily available here * * * To require a nonresident to defend where he commits an alleged wrong is not an unreasonable imposition."

The following citations from *Wein v. Crockett* point out the reason for limiting the jurisdiction of the Court to causes of action arising in this state. The court said at page 230:

"We are convinced under the present day extensions of business into the various states and the rapidity of commuting interstate that the narrow principles of the early cases must be reexamined in the light of modern conditions, and that this state to properly protect its citizens must have a right to subject nonresidents who maintain offices and transact business herein, to be subject to the jurisdiction of our courts if an agent upon whom process can be served is still in the employment of the nonresident and if the cause of action arises out of the business transacted here.

"This holding is not contrary to the holding of the Supreme Court in Flexner v. Farson, supra, and is consistent with the holding in the Howard L. Doherty & Company v. Goodman case, supra. The Pennoyer case is clearly distinguishable from the one herein involved. In that case the agent upon whom process was served was not an agent at the time of service and the statute did not limit the suit to causes of action arising within the state. * * *

"While it may appear unreasonable to re-

quire a nonresident to defend actions which in no way arise out of the transaction of business in a foreign jurisdiction, as was attempted in other cited cases, it is not unreasonable to require a nonresident to defend his rights when the basis of the suit is the performance of certain acts within the jurisdiction where suit is instituted. By voluntarily doing business in this state a nonresident impliedly consents to being sued upon causes of action arising out of the transaction of business in this state and further impliedly consents that service may be made upon an agent in charge of the business office maintained here."

The Court further said at page 226 as follows:

"The Superior Court of Delaware in the case of Caldwell v. Amour et. al., 1 Pennewill 545, 43 A. 517, held a similar statute unconstitutional for the reason that it deprives the defendant of property without due process of law. The act under consideration by that Court was broader in scope than the act under consideration in this case for the reason that under the Delaware statute the cause of action need not arise out of the transaction of business in that state."

At page 227 the Court further stated:

"The Iowa statute required that the defendant have an office or agency in a county; that the office be in a county other than that in which the defendant resides; that the action must grow out of the business of that office or agency and the agent upon whom service is made must be employed by the defendant in the office at the time of the service."

At page 229 the Court stated:

"But there would seem to be no objection to

a statute which forbids nonresidents to do business within the state without having consented to the jurisdiction of the courts of the state as to all causes of action arising within the state and out of the business carried on within the state * * * The words of Mr. Justice Swayne speaking of the unfairness of refusing a group the right to sue a foreign corporation in the state where the corporation was carrying on business and where the cause of action arises are equally applicable * * * The statute requiring persons carrying on business within the state to consent to service of process upon an agent in actions arising within the state out of the business carried on within the state would therefore seem to fall within the proper scope of the police power."

The following is a statement on the subject from Restatement of the Law–Conflicts, Section 84, page 130:

"Unless limited by the Constitution, a state by its laws may absolutely forbid the doings of designated acts within the state. It may allow such acts to be done only after the person doing them has expressly agreed to subject himself to the jurisdiction of the state as to causes of action arising against him arising out of such acts. A state by its law may provide that the doing of such acts shall subject the person doing them to the jurisdiction of the courts of the state as to causes of action arising out of such acts. If such a rule or law is in force in the state at the time when such acts are done within the state, the person doing such acts thereby subjects himself to the jurisdiction of the courts of the state as to causes of action arising out of such acts. The application of this principle to judgments rendered by the courts of the states of

> the United States is much limited because of the limitations on the part of the states to forbid the doing of acts within the states imposed by various provisions of the Constitution of the United States, especially the 14th Amendment and the clause relating to Interstate Commerce as shown in Section 85."

In the case at bar the cause of action arose in California and not in Utah. The original contract, Exhibit "B", was signed in Los Angeles after the same had been signed by the plaintiff in Salt Lake City, and thus became a California contract. The purported breach of the contract took place in California and thus the cause of action arose in California. This point apparently the plaintiff concedes in his brief by the following statement found at pages 20 and 21:

> "It is not necessary that the cause of action (which might technically arise upon mailing a letter of termination in Los Angeles or Washington, D. C., and therefore have its technical situs there) arise in this state but only that the action arise out of conduct of the defendant's business in this state. * * * Thus, the defendant would contend that although the action may arise out of conduct of business done in Utah, the technical situs of the cause of action is in California and arose upon placing the letter of cancellation in the mails. However, this argument is beside the point in view of the express wording of our statute."

The defendant does contend that the cause of action arose in California. However, the argument is not beside the point, but is most material.

The law on the question as to where a cause of action arises in such a matter as is now before the Court, is stated in Restatement of the Law–Contracts, Section 321, as follows:

> "When Repudiation By Mail or Telegram Becomes a Breach.
>
> Statements of repudiation in a letter mailed or telegram sent to a promisee or other person having a right under a contract, which if made orally, would be a breach of contract, constitute a breach as of the time when and the place where the letter or telegram is dispatched."

The case of *Anglaize Box Board Company v. Kansas City Fibre Box Company,* 35 Fed. (2d) 822, is directly in point. In that case the plaintiff, a corporation with its principal place of business at Dayton, Ohio, contracted to sell to the defendant, a corporation with its principal place of business at Kansas City, Kansas, 3600 tons of jute under twelve separate contracts for a shipment once each month during the year. After receiving ten monthly shipments, the defendant and the plaintiff engaged in a dispute over the price of the November shipment and after considerable correspondence, the defendant, on December 11, 1920, wrote a letter to the plaintiff and placed it in the mails at Kansas City, Kansas, repudiating the contract for shipments to be made for November and December. The plaintiff treated the repudiation as a breach and sued for damages. The question arose as to the time and place of breach and accrual of the cause of action because the Statute of Limitations in Kansas was

five years and the Statute of Limitations in Ohio on such an action was fifteen years. In deciding the case, the Court said:

> "It has been repeatedly held that where such repudiation is relied upon as a breach, the cause of action arises where the repudiation occurred, and it is also the rule that, where the repudiation is by letter, the breach occurs at the time and place of the delivery of the letter for transmission, clearly, therefore, the breach occurred at Kansas City when the letter of December 11 was mailed and as this action was not instituted until more than five years thereafter, it was barred under the Kansas Statute of Limitations."

CONCLUSION

The defendant therefore submits that the Trial Court was right in ruling that the Court did not acquire jurisdiction of the defendant. R. W. Dill was not an agent in charge of defendant's business within the contemplation of the statute. The school at which the attempted service was made was not a place of business of the defendant within the contemplation of the statute. The cause of action did not arise in Utah and the Trial Court was right in holding that the cause of action did not arise out of the conduct of business done in this state within the contemplation of the statute.

For the reasons hereinbefore pointed out, it is submitted that the ruling of the Trial Court should be sustained.

Respectfully submitted,

J. GRANT IVERSON,
Attorney for ~~Plaintiff-Appellant.~~
Defendant-Respondent.